

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CRIMINAL NO. CR-08-1669 JB

RICHARD ANTHONY MCKENZIE,

Defendant.

For the United States:

UNITED STATES ATTORNEY'S OFFICE  
District of New Mexico  
201 Third Street, Northwest, Suite 900  
Albuquerque, New Mexico 87102  
BY: MR. DAMON P. MARTINEZ

For the Defendant:

FEDERAL PUBLIC DEFENDER'S OFFICE  
111 Lomas Boulevard, Northwest, Suite 501  
Albuquerque, New Mexico 87102  
BY: MR. ALONZO J. PADILLA

22 Danna Schutte Everett, CRR, RPR, CCR 139  
23 United States Court Reporter  
24 333 Lomas Boulevard, Northwest  
Albuquerque, New Mexico 87102  
Phone: (505) 348-2283  
25 Fax: (505) 348-2285

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1                   THE COURT: Good afternoon, everyone. I appreciate  
2 everyone making themselves available to me this afternoon.

3                   All right. The Court will call United States of  
4 America versus Richard McKenzie, Criminal Matter 08-1669 JB.

5                   Counsel will enter their appearances.

6                   MR. MARTINEZ: Damon Martinez on behalf of the United  
7 States.

8                   THE COURT: Mr. Martinez, good afternoon to you.

9                   MR. PADILLA: Good afternoon, Judge. Alonzo Padilla  
10 on behalf of Mr. McKenzie, who also appears.

11                  THE COURT: Mr. Padilla, good afternoon to you.

12                  Mr. McKenzie, good afternoon to you.

13                  THE DEFENDANT: Good afternoon.

14                  THE COURT: All right. Y'all have to give me some  
15 direction here. My recollection was that evidence was closed  
16 by the parties after we had the suppression hearing but subject  
17 to it being re-opened after I completed my work on the motion  
18 to compel, and so I have dealt with that issue.

19                  And I understand, Mr. Padilla, that you have evidence  
20 that you wish to present. Is that sort of the status of -- or  
21 the posture of our suppression hearing today?

22                  MR. PADILLA: Yes, sir. And this is -- I talked to  
23 Mr. Martinez about this a couple of days ago, but testimony or  
24 evidence I would want to submit are just some additional  
25 questions for the agent, that should not take very long. I

1 imagine I can conclude that fairly quickly. But I just wanted  
2 to clarify some matters that I think are important for the  
3 Court's ruling in terms of the motion itself, the motion to  
4 suppress, and wanted to make the record complete to make sure  
5 that that information is before the Court.

6 THE COURT: All right. And, Mr. Martinez, I  
7 understand you don't have any evidence to present. Is that  
8 correct?

9 MR. MARTINEZ: No, Your Honor.

10 THE COURT: Any additional? All right.

11 Are you ready to --

12 MR. PADILLA: Yes, sir.

13 THE COURT: -- call Mr. Hyland?

14 All right. Mr. Hyland, if you'll come up and stand  
15 next to the witness box before you're seated, Ms. Wild will  
16 swear you in.

17 (Witness sworn.)

18 MS. WILD: Please be seated. State your name for the  
19 record, and spell your last, please.

20 THE WITNESS: Mark Hyland, H-Y-L-A-N-D.

21 THE COURT: Mr. Hyland. Mr. Padilla.

22 MR. PADILLA: Thank you.

23

24

25

1 MARK HYLAND,  
2 after having been first duly sworn under oath,  
3 was questioned and testified as follows:

4 DIRECT EXAMINATION

5 BY MR. PADILLA:

6 Q. Now, Agent Hyland, I'm going to be asking you some  
7 questions. Hopefully, I won't be asking you anything that's  
8 been covered, but if I do, I apologize both to the Court and  
9 counsel.

10 The Court has made a ruling, as you know, regarding  
11 the request I had made for the confidential source --  
12 confidential informant that we referred to, but I wanted to ask  
13 you some questions along that line, but not asking for  
14 specifics.

15 First of all, when you testified, you indicated that  
16 this investigation began as a result of the Passenger Name  
17 Record that you received, what's been referred to as a PNR?

18 A. Correct.

19 Q. And it's my understanding, again referring back to your  
20 prior testimony, that you or someone in your office received a  
21 fax of that PNR?

22 MR. MARTINEZ: Objection. Asked and answered.

23 MR. PADILLA: And I understand that, Your Honor.

THE COURT: Well, it may be, but my memory is not good enough to probably handle that, so I'll allow the

1 question.

2 Q. Anyway, to begin with, was that fax directed specifically  
3 to you? I don't think we covered that in the last hearing.

4 MR. MARTINEZ: Objection, irrelevant.

5 THE COURT: Overruled.

6 A. No.

7 Q. (By Mr. Padilla) Do you remember if it was received in  
8 your office with a cover sheet?

9 MR. MARTINEZ: Objection, irrelevant.

10 THE COURT: Overruled.

11 A. I don't know.

12 Q. (By Mr. Padilla) And just in terms of a question about  
13 the procedure, because I assume this happens on a pretty  
14 frequent basis, as the DEA receives a PNR, is it faxed just  
15 generally to the Drug Enforcement Administration and someone  
16 at that point gives it to whoever is going to be working the  
17 train that day?

18 MR. MARTINEZ: Objection, irrelevant.

19 THE COURT: Overruled.

20 A. It comes to the interdiction group. We have our own fax.

21 Q. (By Mr. Padilla) It goes directly to your group?

22 A. Yes.

23 Q. And did you specifically take that out of the machine that  
24 morning, if you recall?

25 MR. MARTINEZ: Objection.

1 Q. (By Mr. Padilla) If you recall.

2 THE COURT: Overruled.

3 A. I can't recall.

4 Q. (By Mr. Padilla) And you don't recall -- And you do not  
5 recall whether it had a cover page or not?

6 A. No.

7 Q. And in regard to the source of this PNR, do you recall  
8 whether that was sent to your office, the interdiction group,  
9 from a fax number in Arizona or in the state of New Mexico?

10 MR. MARTINEZ: Objection, Your Honor. I'm not sure  
11 how this is relevant to the issue of suppression. It may have  
12 been relevant to the issue that you've already decided.

13 MR. PADILLA: Your Honor, my response would be that  
14 our argument is that this was an investigative stop and not a  
15 consensual encounter, so I think that all this information that  
16 this agent or other agents relied upon is important for the  
17 Court's determination to determine if it was, in fact,  
18 consensual or whether it was an investigative stop.

19 THE COURT: Well, I'm going to allow Mr. Padilla to  
20 create some record here, and his theory is that it's an  
21 investigative stop, so I need to allow him some leeway to  
22 create a record here. Overruled.

23 A. Okay. Could you rephrase it, please?

24 Q. (By Mr. Padilla) Yeah. The question was whether the PNR,  
25 the Passenger Name Record, was sent to you from a fax machine

1 in the state of New Mexico or the state of Arizona.

2 MR. MARTINEZ: Objection, Your Honor, irrelevant.

3 THE COURT: Overruled.

4 A. I think it's Arizona.

5 Q. (By Mr. Padilla) So could we assume, had the individual  
6 who had the initial encounter with Mr. McKenzie when he picked  
7 up his ticket, which had been prepaid, that he was that person  
8 that would have relayed that information to your office?

9 MR. MARTINEZ: Objection, Your Honor. Based upon the  
10 prior case that was argued concerning your decision, this is  
11 getting dangerously close of being able to identify certain  
12 individuals.

13 THE COURT: I think -- I'm going to sustain the  
14 objection to that question.

15 Q. (By Mr. Padilla) Again, I don't know if this will -- I'm  
16 sure there will be an objection to this next question, but, to  
17 your knowledge, was this particular ticket agent conveyed that  
18 information to your office trained by either Agent Claiborne  
19 or Agent Perry?

20 MR. MARTINEZ: Objection, Your Honor. Asked and  
21 answered.

22 THE COURT: Overruled.

23 A. Not to my knowledge.

24 Q. (By Mr. Padilla) The person was not trained by your  
25 office?

1 A. I don't know.

2 Q. Because you recall from the last testimony -- or the last  
3 hearing we had, that you testified that these ticket agents --  
4 and I think that's what brought this issue to a head -- but  
5 that those ticket agents were trained by Claiborne and Perry,  
6 and they were trained to look for particular characteristics  
7 that might meet the drug-courier profile. Correct?

8 A. They were controlled by those DEA employees, by Task Force  
9 Officer Claiborne and Agent Perry.

10 Q. What do you mean by "they were controlled by"?

11 A. Those are their primary contacts.

12 Q. So that the agents that you were referring to were dealing  
13 directly with Perry and directly with Claiborne and not anyone  
14 else in your office locally?

15 MR. MARTINEZ: Objection, Your Honor. This has  
16 nothing to do with the type of stop that the defense says that  
17 he's trying to establish a record for.

18 THE COURT: Well, I think he's just clarifying what  
19 was testified earlier, so I'll allow this. Overruled.

20 Q. (By Mr. Padilla) Okay.

21 A. Yes, they primarily have contact with that person.

22 Q. And you're talking about someone other than whoever may  
23 have faxed this to your office on that particular date?

24 A. I don't understand that question.

25 Q. Okay. The question is whether the person -- And we're not

1 asking for their identity, but whoever faxed that information  
2 to you, and, again, is the PNR that you relied upon when you  
3 went to the train station -- could we conclude that that person  
4 was not working directly with or in contact with Perry or  
5 Claiborne?

6 MR. MARTINEZ: Objection, Your Honor. Irrelevant.

7 THE COURT: Overruled.

8 A. No, that -- that is that person.

9 Q. (By Mr. Padilla) Oh, okay. Well, you're confusing me,  
10 and probably the Court, too. You're saying that person did,  
11 in fact, convey this information to either Perry or Claiborne  
12 and that was the intention when they sent it to your office?

13 A. Yes, sir.

14 Q. And again, you don't remember whether it was a cover page?  
15 And that would have established whether or not it was sent to a  
16 particular person. Would you agree?

17 A. To my knowledge, there was no cover page.

18 Q. And if there had been, would you have provided that to the  
19 Government to provide it to me in discovery?

20 A. I don't know if I would have kept the cover page.

21 Q. But your recollection is there was no cover page?

22 A. Correct.

23 Q. And this individual would have seen Mr. McKenzie in  
24 person, correct?

25 MR. MARTINEZ: Objection, Your Honor.

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1                   THE COURT: Well, why don't you lay a foundation  
2 question there, whether he would know the answer to that, and  
3 then we'll decide whether the question is objectionable.

4 Q. (By Mr. Padilla) This ticket agent, or any other ticket  
5 agent working for Amtrak, would have been the person that  
6 Mr. McKenzie or anyone else came in contact with to get a  
7 ticket. Is that a fair statement?

8                   MR. MARTINEZ: Objection. Calling for speculation.

9                   THE COURT: Well --

10                  MR. PADILLA: Well, he can answer that.

11                  THE COURT: Again, I think we need a foundational  
12 question, whether he knows this or not, and then I think that  
13 will probably take care of the objection.

14 Q. (By Mr. Padilla) Do you know one way or the other  
15 whether -- that procedure for the ticket agent giving a  
16 particular ticket to a person on a particular day?

17 A. I don't know what would have happened at that station.

18 Q. And I think to clarify -- not to ask you any questions  
19 you've been asked again, but I don't have complete memory,  
20 either, as to what happened -- but is it fair to say that you  
21 never spoke to this individual, either before, during, or after  
22 Mr. McKenzie's arrest?

23                  MR. MARTINEZ: Objection, Your Honor. Asked and  
24 answered.

25                  THE COURT: Overruled.

1 A. Correct.

2 Q. (By Mr. Padilla) And to your knowledge, has this  
3 particular ticket agent provided reliable information in the  
4 past that resulted in either an arrest or seizure of  
5 contraband?

6 MR. MARTINEZ: Objection, Your Honor. Irrelevant.

7 THE COURT: Why don't -- Why don't we have a  
8 foundational question whether he knows, and then I'll determine  
9 whether he can answer this.

10 Q. (By Mr. Padilla) Again, without asking for the name of  
11 this person, based on your employment at the DEA and the type  
12 of work you do, including the drug interdiction actions at the  
13 station, have you had any prior experiences with this ticket  
14 agent?

15 MR. MARTINEZ: Objection, Your Honor. Irrelevant.

16 THE COURT: Overruled.

17 A. Yes.

18 Q. (By Mr. Padilla) And getting back to my previous  
19 question, has this particular ticket agent provided reliable  
20 information in the past that resulted in either an arrest  
21 and/or confiscation of drugs or contraband?

22 A. Yes.

23 Q. And when you received that fax on that particular date,  
24 would it be fair to say you felt this was a reliable source?

25 A. Yes.

1 Q. And that would be based on your prior experience with this  
2 individual?

3 A. Correct.

4 Q. And I think we established in the last hearing that the  
5 DEA no longer has direct access to information about the  
6 passenger manifest or passengers on a particular train.

7 Correct?

8 MR. MARTINEZ: Objection, Your Honor. Irrelevant.

9 THE COURT: I'll allow the question. Overruled.

10 A. Correct.

11 Q. (By Mr. Padilla) And again, not wanting to have you  
12 testify to what you've already testified to, but it's  
13 important for the questions I'm going to ask. The procedure  
14 in place when Mr. McKenzie was arrested is that the ticket  
15 agents who had been trained by the Drug Enforcement  
16 Administration would send information to your office regarding  
17 the passengers that they felt might fit the profile of a drug  
18 courier, correct?

19 MR. MARTINEZ: Objection. Asked and answered.

20 THE COURT: Well, it probably has been, but I'll  
21 allow it here, given the gap of time.

22 A. Correct.

23 Q. (By Mr. Padilla) And, sir, in this particular case  
24 involving Mr. Richard McKenzie, after receiving information --  
25 that is, the information about Mr. McKenzie from the PNR --

1 did you run that name through NCIC?

2 A. No.

3 Q. And that has been a procedure used in the past, has it  
4 not, by the Drug Enforcement Administration?

5 A. Well, I know you need personal identifiers to run an NCIC  
6 computer check. You can't just run a name.

7 Q. But it has been done in the past, has it not?

8 A. I think it has been, yes.

9 Q. Sir, do you recall testifying in the case of U.S. versus  
10 Denny, found at 441 F.3d 1220? This is a Tenth Circuit case in  
11 2006.

12 A. I remember testifying.

13 Q. A traffic accident case. Do you remember that case?

14 A. Uh-huh.

15 Q. And I think you were one of the main participants in that  
16 particular case, but do you remember testifying in that  
17 particular case that an NCIC was run on the individual who came  
18 up on the passenger list who was suspected as being a drug  
19 trafficker?

20 A. I don't recall that specifically, no.

21 MR. PADILLA: I'd ask the Court to take judicial  
22 notice of this case and the fact that it does say that --  
23 whatever -- it relies upon Hylander's testimony in explaining  
24 how Amtrak interdictions were being performed at that  
25 particular time, and in this particular case involving

1 Mr. Denning, it indicates that an NCIC report was run for the  
2 defendant prior to the train arriving in New Mexico.

3 Q. Does that refresh your memory?

4 MR. MARTINEZ: I'm going to ask defense counsel, does  
5 he have an extra copy of that case?

6 Q. (By Mr. Padilla) In other words, does that refresh your  
7 memory as to the testimony in that particular case?

8 A. A little bit. I mean, that was quite a while ago.

9 Q. And you also testified in that case -- and this would be  
10 in footnote number 1 -- that oftentimes people, in your  
11 opinion, as drug couriers will purchase a ticket immediately  
12 before travel because they don't really know when they're going  
13 to get their drugs from the source city and that they leave  
14 their travel open so that they can go ahead and obtain their  
15 drugs and then take the train shortly after that.

16 A. That's a common occurrence that we see.

17 Q. Okay. And you, of course, would agree that that was not a  
18 factor in this case, due to the fact that Mr. McKenzie had  
19 purchased his ticket at least five days before travel, which  
20 someone, as a family member, used on a credit card. Do you  
21 remember that?

22 A. Yes, sir. It was a third-party purchase.

23 Q. And so this case doesn't really come within the type of --  
24 it wasn't the type of factor that would have been applicable to  
25 determining whether a person met the drug-courier profile?

1 A. Well, there were other factors there.

2 Q. Okay. But in terms of that factor, that's not present in  
3 this case?

4 A. Correct.

5 Q. And in terms of other factors, one would be originating  
6 from a source city and going to a source city?

7 A. Correct.

8 Q. And --

9 A. The cost.

10 Q. And the cost. Now, Amtrak, obviously, makes these  
11 sleeper -- sleeper compartments available to the public or to  
12 any other people that travel for whatever reason using the  
13 sleeper compartment?

14 A. Correct.

15 Q. And there are people, obviously, willing to pay that  
16 price?

17 A. Well, he paid a high price because it was booked within  
18 five or six days of travel during the summer busy season.

19 Q. Right. But in terms of the general public, that would  
20 have been the price anyone would have paid if they would have  
21 made their reservations --

22 A. Correct.

23 Q. -- late?

24 And other than those two factors, can you remember  
25 any other factors that stuck out in your mind as to why

1 Mr. McKenzie should be approached?

2 A. No.

3 Q. Just those two factors?

4 A. Yes.

5 Q. And in terms of the source city, would you agree that's  
6 pretty ambiguous, in terms of a source city could be pretty  
7 much any city in the west? Los Angeles, Las Vegas, Phoenix,  
8 Tucson, Albuquerque, et cetera?

9 A. And many of the cities in the western source cities, yes,  
10 because we're so close to border.

11 Q. But that in and of itself would not be enough. Would you  
12 agree?

13 A. Correct.

14 Q. Now, after arriving at the train station -- you already  
15 testified about this, so I'll try to skip over this as quickly  
16 as possible -- again, because of the information you  
17 received -- maybe you can clarify this -- did you know  
18 immediately what sleeper compartment and what car he would be  
19 located in?

20 A. Yes.

21 Q. And so you went directly to him or to that sleeper, or did  
22 you go talk to the conductor first?

23 A. I went to the car first, and I found the conductor.

24 Q. And, sir -- But you wanted to find out where Mr. McKenzie  
25 was, correct?

1 A. I wanted to see if Mr. McKenzie was even on the train.

2 Q. And he verified that he was in, I think, 431 or whatever  
3 the compartment was?

4 A. Yes.

5 Q. Did you talk to the conductor at length about  
6 Mr. McKenzie, in terms of what he did during the train ride,  
7 whether there was anything suspicious in the way of his  
8 conduct, his questions, anything of that nature?

9 A. I asked him was he in his room or was he -- what was he  
10 wearing, was he acting as you've suggested, was there any  
11 strange behavior, et cetera, and I probably spent only 15 or 20  
12 seconds with the conductor. He told me he was in -- probably  
13 about 30 years old, 35 years old, and he was wearing a white  
14 shirt, and he didn't know if he was in his car or not.

15 Q. But he didn't indicate there was anything suspicious about  
16 his conduct?

17 A. No.

18 Q. Didn't indicate that Mr. McKenzie appeared to be nervous?

19 A. No.

20 Q. Or that he wanted his privacy and didn't want anybody in  
21 his room and just shut up in his room the whole time? Never  
22 said anything about that?

23 A. No.

24 Q. That was the extent of the information you received --

25 A. Correct.

1 Q. -- from the conductor?

2 Now -- And again, I think it's been testified to,  
3 clearly, when you approached Mr. McKenzie, that he was on the  
4 platform smoking a cigarette, that he didn't appear to be  
5 nervous, to exhibit any kind of suspicious conduct.

6 A. Not initially, no.

7 Q. He was just smoking a cigarette, correct?

8 A. Correct.

9 Q. When you, I guess, were looking for Mr. McKenzie, from  
10 what I recall, you were having a difficult time locating him  
11 based on the -- well, the fact that he wasn't in the -- on the  
12 train, he wasn't in the dining car, and he didn't appear to be  
13 in the platform when you first went outside. Correct?

14 A. Correct.

15 Q. But once you saw this individual who you thought to be  
16 Mr. McKenzie, you did make up your mind to approach him  
17 immediately, correct?

18 A. Yes.

19 Q. And in terms of the description you received from the  
20 conductor, you indicated he was wearing a white T-shirt or --

21 A. Or a white golf shirt.

22 Q. About 30 years old?

23 A. Thirty or 35.

24 Q. African American?

25 A. He didn't mention that, no.

1 Q. He did not mention that he was African American?

2 A. No.

3 Q. As soon as you determined that this appeared to be  
4 Mr. McKenzie, you did immediately turn on your belt recorder,  
5 correct?

6 A. I turned it on before I approached Mr. McKenzie.

7 Q. Right. In other words, before -- he wasn't aware that you  
8 were turning it on?

9 A. Correct.

10 Q. And you didn't notify him that you had your belt recorder  
11 running to record your conversation?

12 A. No.

13 Q. And you, obviously, didn't get his permission to record  
14 the conversation either?

15 A. No.

16 Q. And would it be fair to say that the practice of the Drug  
17 Enforcement Administration is to turn on the tape recorder as  
18 soon as you find the target or the individual that you're  
19 looking for based on the information you previously received?

20 A. Yes.

21 Q. And you don't turn on the belt recorder to talk to, let's  
22 say, witnesses in a case. You didn't have it on when the  
23 conductor was answering your questions, correct?

24 A. Correct.

25 Q. And it's not your practice to have it on while you're

1 talking to other individuals who might have information about  
2 someone you're investigating?

3 A. No.

4 Q. But your practice is to turn it on as soon as you know  
5 that that's the target of your investigation, correct?

6 A. I didn't know that was the target of my investigation.

7 Q. But you did turn on your recorder at that time?

8 A. Before I started any consensual encounter, yes.

9 Q. Now, in addition to -- And I think maybe this is clear  
10 from the information we've gotten from you so far, but the  
11 person, the confidential source that provided this information  
12 to you, did they provide any kind of physical description of  
13 Mr. McKenzie, in terms of what he was wearing, his age, and his  
14 nationality or ethnicity?

15 MR. MARTINEZ: Objection, Your Honor. Irrelevant.

16 THE COURT: Overruled.

17 A. I can't remember.

18 Q. (By Mr. Padilla) Okay. So you might have spoken to this  
19 person? Is that how I can interpret that answer?

20 A. No, I don't -- I never spoke to that individual.

21 Q. But they might have -- But that individual might have  
22 provided you information that you don't recall at this time?

23 A. Possibly.

24 Q. Okay. Can you explain that? You just stated you didn't  
25 speak to this person, but it's possible that this person might

1 have provided you physical -- or some information to you about  
2 his physical appearance?

3 MR. MARTINEZ: Objection, Your Honor. This is  
4 irrelevant.

5 MR. PADILLA: Well, it's confusing.

6 THE COURT: I'll allow the question. Let me have him  
7 clarify it. Overruled.

8 A. I can't remember the specific case, but I know I didn't  
9 talk to the individual.

10 Q. (By Mr. Padilla) But you might have received information  
11 from this individual through some other source, through  
12 another agent?

13 A. No.

14 Q. I guess -- I hope you understand why I'm confused, because  
15 you said, I didn't talk to this person, but then you say this  
16 person might have provided some information to you about the  
17 physical appearance.

18 A. He provided the PNR.

19 Q. Is any training provided to agents, particularly in this  
20 office, regarding the use of a tape-recorder, when you use it,  
21 when you shouldn't use it, and things of that nature?

22 A. On-the-job training.

23 Q. And what exactly are you told about the use of the  
24 tape-recorder when you're encountering persons like  
25 Mr. McKenzie in this situation?

1 A. Well, prior to me getting into interdiction in 2000, they  
2 were already using tape-recorders, and we've -- I think they  
3 continue to do that.

4 Q. Right. But in terms of any kind of training that you've  
5 received, even on the job, as to when you should turn it on and  
6 what point it should be turned on when you're approaching a  
7 target, when it should be turned off, anything in the way of  
8 training regarding that?

9 A. I always turn it on before I start my consensual  
10 encounter. If I'm in a coach car, there are several  
11 passengers, because the coach has many passengers, I'll turn it  
12 on and start at one end and just continue to talk to people as  
13 I go through the car.

14 Q. But in this case that wasn't the case? You had one person  
15 and that was Mr. McKenzie, who you wanted to investigate or  
16 question about his travels, correct?

17 A. Correct.

18 Q. And I think from the last hearing it was established that  
19 there was probably about maybe 200 or 300 people on this train.

20 A. Yes.

21 Q. And this was the only report -- or the only PNL -- excuse  
22 me -- PNR that you received regarding passengers in that train?

23 A. I believe so, yes.

24 Q. And there's no question that if Mr. McKenzie had purchased  
25 that ticket immediately before travel, with cash, that he would

1 have been -- he would have fit within the drug-courier profile  
2 that you look at as an agent?

3 MR. MARTINEZ: Objection, Your Honor. Calling for  
4 speculation.

5 THE COURT: Well, if he can answer it.

6 A. Yes, I would have approached Mr. McKenzie.

7 Q. (By Mr. Padilla) It would give you more reason to  
8 approach him if he had paid cash for that ticket immediately  
9 before travel?

10 A. Correct.

11 Q. This will be the last question.

12 Out of all the passengers, at least the ones that got  
13 on the train in Flagstaff, do you know whether -- for a fact  
14 whether any of those individuals paid for their ticket with  
15 cash?

16 MR. MARTINEZ: Objection, Your Honor. Calling for  
17 speculation.

18 THE COURT: Well, it's a foundational question at  
19 this point.

20 A. I can't answer that question.

21 Q. (By Mr. Padilla) Why?

22 A. I don't know.

23 MR. PADILLA: I have no further questions, Your  
24 Honor.

25 THE COURT: All right. Thank you, Mr. Padilla.

1                   Mr. Martinez, do you have cross-examination of  
2 Mr. Hyland?

3                   MR. MARTINEZ: Yes, Your Honor, I do.

4                   THE COURT: Mr. Martinez.

5                   MR. MARTINEZ: Your Honor, if I may have a moment?

6                   THE COURT: You may.

7                   CROSS-EXAMINATION

8 BY MR. MARTINEZ:

9 Q. Agent Hyland, you were just asked about the case of United  
10 States versus Denny. Do you remember being asked about that?

11 A. Yes, sir.

12 Q. And isn't it true that you were actually involved -- or  
13 let me ask -- Do you remember, if the case cites that there  
14 were actually three DEA agents involved, Ron Deist, Mark  
15 Hyland, and William Dorian, is that accurate?

16 A. Yes.

17 Q. And you stated on -- in response to the previous question,  
18 that you didn't -- you didn't remember whether you did a  
19 background check or not.

20 A. Correct.

21 Q. And have you read this case?

22 A. That's many -- That's several years ago. No, I haven't  
23 read it.

24 Q. Now, on page -- On page 1222, if it states, "Agents also  
25 ran a criminal history check on Defendant and found prior

1 drug-related convictions," that doesn't indicate that you're  
2 the one that ran the background check, right?

3 A. Correct.

4 Q. Now, on Footnote 1, do you remember in this case  
5 testifying, "Explain the significance of a one-way ticket"?

6 A. Yes.

7 Q. And do we have a one-way ticket in this case?

8 A. Yes.

9 Q. Now, also in this case you have the defendant -- you have  
10 the defendant's ticket being bought days before, right?

11 A. Correct.

12 Q. And it was five days before?

13 A. Yes.

14 Q. Now, as part of your thinking, you asked for permission to  
15 go into his sleeping compartment. Is that true?

16 A. Yes.

17 Q. And in his sleeping compartment you asked him where he was  
18 coming from and going to, right?

19 A. Yes.

20 Q. And did he indicate to you why he was on the West Coast?

21 MR. PADILLA: That goes beyond the questions that  
22 were asked during my questioning of this witness.

23 THE COURT: Well, I'll allow it, and I'll allow you  
24 to redirect on that issue, Mr. Padilla. Overruled.

25 Q. (By Mr. Martinez) Did he tell you why he was on the West

1 Coast -- or where he was?

2 A. Yes.

3 Q. What was that?

4 A. It was a family reunion in Phoenix.

5 Q. And when you were in the sleeping compartment did he  
6 indicate whether he liked to fly or not?

7 A. He told me he did not like to fly and that was why he was  
8 on Amtrak.

9 Q. Now, did you examine his luggage in the sleeping  
10 compartment?

11 A. Yes.

12 MR. PADILLA: These were asked and answered at the  
13 prior hearing, Your Honor.

14 THE COURT: Well, I think they are, but I haven't had  
15 a chance to review the transcript in full since then, so I'm  
16 going to allow the question. Overruled.

17 Q. (By Mr. Martinez) Did you examine his luggage in the  
18 sleeping compartment?

19 A. Yes.

20 Q. And did you see a tag for an airline flight on his  
21 luggage?

22 A. Yes.

23 Q. Now, put that in context with when this one-way ticket was  
24 bought.

25 A. It was -- He flew on July 3rd, 2008, and the baggage claim

1 ticket had his name on it, which is the same name that was on  
2 the Amtrak ticket.

3 Q. Now, was that important to you in your investigation of  
4 this defendant?

5 A. Yes.

6 Q. How was that important to you?

7 A. Well, Mr. McKenzie had already told me that he didn't like  
8 to fly and that's why he was taking the Amtrak train, and yet  
9 he had flown approximately five days before I'm encountering  
10 him.

11 Q. Did this evidence provide -- Did this -- Did these facts  
12 provide evidence of a drug courier to you?

13 A. Yes, sir.

14 Q. Why?

15 A. It's common for them to fly out to the source city, since  
16 they're not carrying any contraband, to stay in the source city  
17 until they get the contraband, and then to take Amtrak or the  
18 bus to go back to their -- to their city.

19 Q. Now I'm going to read you something from this case that  
20 you were examined, United States versus Denny. It's a  
21 footnote, and it says, "Agent Hyland further explained the  
22 significance of the timing of defendant's purchase." This is  
23 you talking.

24 Or let me ask if you remember saying this. "Due to  
25 my training, experience, narcotic couriers commonly -- they

1 don't have control of their time. They have to -- they may be  
2 waiting for narcotics to arrive at their city of origin, and  
3 they don't know how they're going to get back, and they make  
4 reservations at the last minute, they purchase tickets at the  
5 last minute."

6 Now, when you said -- Do you remember saying this --

7 A. Yes.

8 Q. -- now that I'm reading this to you?

9 When you say "last minute," do you remember literally  
10 the last minute?

11 A. Sometimes it is the last minute.

12 Q. But what could you -- What exactly did you mean by the  
13 "last minute," by that phrase?

14 A. A short time between when they get the narcotics and when  
15 they're going to depart to go back home.

16 Q. Would that be a short time before they actually get on the  
17 train?

18 A. It could be.

19 Q. Now, you asked -- When he was -- When you were being asked  
20 questions about this case, and the defense counsel was trying  
21 to distinguish this case from what happened in Mr. McKenzie's  
22 case, you stated no, that you don't have the same circumstances  
23 here in Mr. McKenzie's case, right? Did you say that?

24 A. Yes.

25 Q. Well, I'm asking you, is purchasing a ticket, a one-way

1 ticket five days prior to getting on a train -- would you  
2 consider that last minute?

3 A. It's not -- Well, it's not last minute, but it's close.

4 Q. Okay. And what do you mean by that?

5 A. That it's -- Well, it's within the time frame that a drug  
6 courier could be planning on returning home.

7 Q. So it is close in time?

8 A. Yes.

9 Q. And part of that consideration is it's a one-way ticket?

10 A. And it is a one-way ticket, yes.

11 Q. And in this case you had -- you had drug coming from a  
12 source city?

13 A. Yes, sir.

14 Q. And had indications that the drug was being taken to a  
15 destination city?

16 A. Yes.

17 Q. And is that part of the courier profile?

18 A. Yes.

19 Q. And in preparation for this hearing you did not read  
20 United States versus Denny, did you?

21 A. No, sir.

22 MR. PADILLA: I'm sorry, what was the last question?

23 MR. MARTINEZ: "In preparation for this hearing, you  
24 did not read United States versus Denny?"

25 Your Honor, when defense counsel asked the Court to

1 take judicial notice of United States versus Denny. I would  
2 ask that if the Court does that, that it look for a specific  
3 sentence in this case where it indicates that Officer Hyland is  
4 the person who testified to the background being done. I don't  
5 believe it exists in this case. I believe it states that NCIC  
6 was done, but it doesn't indicate that Agent Hyland was the  
7 person that did that.

8 Q. Agent Hyland, you were asked about an NCIC check. You  
9 need personal identifiers to do that, right?

10 A. Yes.

11 Q. And in this case did you have those personal identifiers?

12 A. No.

13 MR. MARTINEZ: Pass the witness, Your Honor.

14 THE COURT: Thank you, Mr. Martinez.

15 Mr. Padilla, do you have redirect of Mr. Hyland?

16 REDIRECT EXAMINATION

17 BY MR. PADILLA:

18 Q. You were asked questions about the Denny Travis case. Do  
19 you specifically remember what information as -- specific  
20 information about Mr. Denny that you had or whether the agents  
21 had to be able to run an NCIC?

22 A. No, sir.

23 Q. I'm sorry?

24 A. No, I don't.

25 Q. You don't recall?

1 A. No.

2 Q. But in this particular case -- that is, Mr. McKenzie's  
3 case -- from the PNR, you did have his full name, Richard  
4 McKenzie?

5 A. Yes.

6 Q. And you're indicating that you would need more than that?

7 A. Yes.

8 Q. Did you also -- Would you also include where he was  
9 residing? Because in this case were you aware that he was from  
10 New York and that was his residence?

11 A. I wouldn't have known that until after speaking with  
12 Mr. McKenzie.

13 Q. And I'm not familiar with how the NCIC works. I'm going  
14 to ask you a question there. If you were to just put in a  
15 name, is it possible that you could get five hits on that name  
16 add then narrow it down to a particular person? Because I  
17 don't know what happens when you run an NCIC. If you could  
18 explain that to the Court.

19 A. Without personal identifiers, you wouldn't be able to get  
20 anything.

21 Q. What are the personal identifiers you're talking about?

22 A. The date of birth or a Social Security number.

23 Q. Now, in the past -- I know -- I think you testified that  
24 it's not the procedure now, but in the past, have you  
25 personally, as an agent, run an NCIC check on a passenger who's

1 arriving on a particular day?

2 MR. MARTINEZ: Objection. Asked and answered.

3 THE COURT: Overruled.

4 A. If I have a personal identifier with a name, I could run  
5 it.

6 Q. (By Mr. Padilla) Okay. That question is, have you ever  
7 run an NCIC on a passenger who you were targeting as a part of  
8 an investigation?

9 A. Yes.

10 Q. And you were asked questions about going into the sleeper  
11 and seeing the luggage with the tag from the airline, correct?

12 A. Yes.

13 Q. But you didn't know that until you actually got into  
14 Mr. McKenzie's sleeping compartment -- sleeper compartment?

15 A. Correct.

16 Q. So when you first approached him, you didn't know anything  
17 about where he was coming from or how long he had been in  
18 Phoenix or whether he'd even been in Phoenix, correct?

19 A. Correct.

20 Q. And I guess we could play games with the definition of  
21 what a last-minute purchase is, but wouldn't you agree that in  
22 the majority of the cases that you've dealt with over the years  
23 a last-minute purchase means the person arrives at the train  
24 station shortly before the train is leaving and purchases a  
25 ticket with cash?

1 MR. MARTINEZ: Objection. Argumentative.

2 THE COURT: Well, let him define this term.

3 Overruled.

4 A. Many times it's closer than five days.

5 Q. (By Mr. Padilla) And usually the same day. Would that be  
6 a fair statement?

7 A. Many times it is the same day, the day of travel.

8 Q. And many times it's an hour or two hours before travel?

9 A. Sometimes, yes.

10 Q. And you've been doing this for how many years, in terms of  
11 the drug interdiction and the training?

12 A. About eight years.

13 Q. Would you agree that it's very rare that a person who is  
14 caught with drugs would purchase their ticket with a credit  
15 card five days prior to that train leaving?

16 A. It's rare, yes.

17 Q. Thank you.

18 MR. PADILLA: No further questions, Your Honor.

19 THE COURT: Thank you, Mr. Padilla.

20 All right, Mr. Hyland, you may step down. Thank you  
21 for your testimony.

22 Mr. Martinez, do you have any further evidence that  
23 you wish to present?

24 MR. MARTINEZ: No, Your Honor.

25 THE COURT: All right. And, Mr. Martinez -- Did I

1 say Mr. Padilla?

2 I'm sorry, do you have any, Mr. Padilla?

3 MR. PADILLA: No, sir.

4 THE COURT: Do you have anything further,  
5 Mr. Martinez?

6 MR. MARTINEZ: No.

7 MR. PADILLA: If I may have --

8 (A conference was held between the defendant and  
9 Mr. Padilla.)

10 MR. PADILLA: My client had some legal materials that  
11 were with him this morning, unfortunately, they were sent back  
12 to the facility with the prisoners that were going back, so he  
13 doesn't have that information with him.

14 He has asked -- this is also based on a conversation  
15 we had earlier -- and it's again his request and not mine --  
16 that the Court consider conducting a Franks hearing in this  
17 particular matter. I don't see the reason or the need for  
18 that, Your Honor, and I don't know if my client wants to  
19 address that, but I wanted to bring that to your attention.

20 But in terms of any other testimony or evidence, we  
21 don't have anything else to present at this time.

22 THE COURT: All right. And you have nothing further,  
23 Mr. Martinez?

24 MR. MARTINEZ: No, Your Honor.

25 THE COURT: All right. Well, I'll not conduct a

1 Franks hearing at the present time. If y'all decide that  
2 that's appropriate, then we can resume and do that, but at the  
3 present time why don't we take up the motion to suppress?

4 Is there any arguments -- anything further you wish  
5 to say on the motion to suppress, Mr. Padilla?

6 MR. PADILLA: Your Honor, I think we've covered that  
7 in our suppression motion and reply we filed to the  
8 Government's motion. I think it just comes down to whether or  
9 not this was an investigative stop or a consensual encounter.  
10 We feel that it is not a consensual encounter, and that's bore  
11 out by the fact that this agent, Agent Hyland, specially  
12 targeted Mr. McKenzie. That was based on information that he  
13 received from a reliable source, that source being the  
14 confidential source in -- I'm assuming Arizona -- provided  
15 information to him, I think specifically went to Mr. McKenzie  
16 to confront him, to question him, and to obtain information  
17 that would support his determination that has already been made  
18 that Mr. McKenzie was a drug courier -- was a drug courier.

19 And this is further supported by the fact that when  
20 he was approached -- when -- or when he approached Mr. McKenzie  
21 he immediately turned on his belt recorder and started to  
22 record the conversation.

23 I do not feel that the encounter in this case was  
24 consensual in any sense of the word, that it was definitely an  
25 investigative stop from the very beginning, and that under the

1       circumstances in this case, based on the testimony and evidence  
2       we've presented -- and there is sufficient evidence to support  
3       the Court's granting of our suppression motion at this stage.

4           And I -- I was not prepared to argue much beyond that  
5       because we've covered those issues. If you wanted us to brief  
6       that again, we can certainly do that, Your Honor, but I think  
7       that is the crux of what this case comes down to from our  
8       perspective.

9           THE COURT: All right. Thank you, Mr. Padilla.

10           Mr. Martinez, do you wish to argue in opposition to  
11       the motion?

12           MR. MARTINEZ: Yes, Your Honor. And I will argue  
13       briefly.

14           Your Honor, the facts in this case are extremely  
15       simple. The PNR was not relied upon in any way except initial  
16       information. The initial approach to the defendant,  
17       Mr. McKenzie, by Special Agent Hyland, the facts that you have  
18       before you, it was a conceptual encounter. Agent Hyland from  
19       the beginning was asking permission to speak to Mr. McKenzie,  
20       and it wasn't only at that point, but he continuously asked  
21       Mr. McKenzie for additional things, such as "May I see your  
22       ticket?" When they went back to his room, "Can I enter your  
23       room? Can I search the luggage?" And at each point, at each  
24       stage in this process Mr. McKenzie said that -- gave  
25       authorization to do such things.

1           And I pointed this out in the last hearing and I'm  
2 sorry to repeat myself, but I think the best example of why  
3 this was consensual from the very beginning was, when they got  
4 to those heavy cereal boxes, Special Agent Hyland asked to  
5 search the cereal boxes themselves, those three boxes. It was  
6 at that point that Mr. McKenzie said no and Agent Hyland  
7 respected that.

8           Now, one of the issues here, Your Honor, was at what  
9 point should this have been -- reasonable suspicion or probable  
10 cause established, and the United States' position is that when  
11 Agent Hyland went back to the compartment room with  
12 Mr. McKenzie and what he observed in that compartment room, it  
13 was at that point that there was probable cause to believe that  
14 a crime had been committed. And Mr. McKenzie was not arrested  
15 at that point. Agent Hyland, in furthering his investigation,  
16 allowed Mr. McKenzie to go out on the platform.

17           And if I may remind the Court of the specific facts  
18 of this case, it was out there that Mr. McKenzie was allowed to  
19 use the phone to call his friend. It was obvious that his  
20 friend was not aware of what was going on, was just trying to  
21 go with the situation. And, also, if I can remind the Court,  
22 bring to its attention, it was about that time when Special  
23 Agent Hyland had had enough and went to arrest Mr. McKenzie and  
24 that's when he started chasing him around in a Keystone Kop  
25 type of scenario around the platform of the train station

1 himself.

2 Your Honor, the facts of this case, again, are very  
3 simple. This was a consensual encounter and the probable cause  
4 and reasonable suspicion were established.

5 And the last argument, that I'm not mentioning, but  
6 it is mentioned in the brief, is that Mr. McKenzie abandoned  
7 the luggage, too, by after -- not allowing Agent Hyland to  
8 arrest him on the platform, he then ran to his room, busted out  
9 the window and took off down the platform itself and crossed  
10 the barbed wire fence. It was at that point that the luggage  
11 and the compartment were abandoned and also the search warrant  
12 that Special Agent Hyland obtained was proper in this manner,  
13 Your Honor.

14 And I'm open to any questions the Court may have.

15 THE COURT: Let me -- Let me ask you to address a  
16 couple of points that Mr. Padilla has raised.

17 One is, at what point would you say that the officers  
18 had reasonable suspicion?

19 MR. MARTINEZ: It was in the compartment, Your Honor.

20 THE COURT: In the compartment?

21 MR. MARTINEZ: Yes, Your Honor.

22 THE COURT: At what point in the compartment?

23 MR. MARTINEZ: Well, Your Honor, it was -- Let me  
24 back up, because starting with the document that Agent Hyland  
25 had received, he had certain information concerning a

1 Mr. McKenzie. In approaching Mr. McKenzie, asking for his  
2 consent, he was able to verify the information by speaking to  
3 him, and that was outside and leading up to the compartment.  
4 He was able to verify that it was Mr. McKenzie, that it was a  
5 one-way ticket. And that corroborated his information.

6 Now, by going to the compartment itself, there's  
7 several things in there. One, he was able to corroborate that  
8 there were two pieces of luggage, and also in speaking to the  
9 conductor, that it was a deluxe compartment.

10 Now, the important thing about the deluxe compartment  
11 itself was with Agent Hyland. He's aware of that compartment,  
12 and he's also aware of the benefits that go with that  
13 compartment. Specifically, there being you get free food for  
14 purchasing that compartment. How is that important? Because  
15 there's three cereal boxes there, and when Agent Hyland asked  
16 him in the compartment why so many cereal boxes, "I like  
17 cereal." Well, Agent Hyland knows that you get free food by  
18 buying that compartment. He didn't see any boxes -- I'm sorry.  
19 He didn't see any cereal bowls, he didn't see any milk, he  
20 didn't see anything to indicate that this person really liked  
21 eating cereal.

22 Also, it was in the compartment where -- I'm taking  
23 this out of order here, but he was able to feel the weight of  
24 the three boxes, he was able to feel a heavy weight in the  
25 center of the boxes, he was able to feel the heavy weight of

1 the boxes themselves.

2 It was also while in the compartment -- And this is  
3 what I brought up in questioning today, Your Honor, and I was  
4 trying to, I guess, remind the Court in the context of the  
5 courier information. But this defendant was asked while in the  
6 compartment, "Where are you coming from? Where are you going  
7 to?"

8 He's coming from a -- from a source city here in the  
9 west or southwest and he's going to a destination city. But  
10 part of what's so important about that is, he says he doesn't  
11 like to fly, but, yet, Agent Hyland is able to observe on one  
12 of the luggage bags a label from an airline showing that he  
13 flew in the day after the tickets were reserved, which shows  
14 that he's coming into the area and he's getting out of the area  
15 real fast like, Your Honor.

16 THE COURT: But, while he was corroborating  
17 information and getting further information, I believe you  
18 indicated that it was not -- it was not until they were at the  
19 sleeper car itself that you believe the officers had reasonable  
20 suspicion. Correct?

21 MR. MARTINEZ: Yes, Your Honor.

22 THE COURT: And at what point -- what point of the  
23 sleeper car did they have that?

24 MR. MARTINEZ: Well, I would say that definitely once  
25 Agent Hyland felt the weight of the boxes and felt the -- felt

1 the boxes themselves, the cereal boxes.

2 THE COURT: So after he saw the boxes at the bottom  
3 of the baggage and picked them up, shook them, that's when he  
4 did?

5 MR. MARTINEZ: Yes. Yes, Your Honor. And the point  
6 there is, everything that I was mentioning that happened before  
7 hand, that's part of the context of how he arrived at that  
8 point.

9 THE COURT: Of that reasonable suspicion?

10 MR. MARTINEZ: And it was all consensual. It was  
11 consensual when he asked to speak to him, it was consensual  
12 coming into the compartment, it was consensual looking at the  
13 bags. He feels the boxes, and it's consensual at that point,  
14 and then he asks, "Can I search the boxes, the cereal boxes?"  
15 That's when the defendant says no.

16 THE COURT: At what point would you say that the  
17 officers had probable cause?

18 MR. MARTINEZ: Well, it was at that point, too.

19 THE COURT: Same point?

20 MR. MARTINEZ: Yes, Your Honor.

21 THE COURT: So they developed reasonable suspicion  
22 and probable cause at the same point?

23 MR. MARTINEZ: Yes, Your Honor.

24 THE COURT: Anything further, Mr. Martinez?

25 MR. MARTINEZ: No, Your Honor.

1                   THE COURT: Thank you, Mr. Martinez.

2                   Mr. Padilla, I'll give you the last word on the  
3 motion to suppress.

4                   MR. PADILLA: Yes, sir.

5                   I think the Government has conceded that the  
6 reasonable suspicion may have started when that information was  
7 conveyed from the confidential source to the DEA office to have  
8 them, I guess, look at --

9                   THE COURT: Well, he's certainly saying that that's  
10 information that was part of the reasonable suspicion.

11                  MR. PADILLA: Right.

12                  THE COURT: But I think he's conceding, and I don't  
13 think he'd probably argue otherwise, that he didn't have  
14 reasonable suspicion just when he got the PNR.

15                  MR. PADILLA: Probably not. But it was still the  
16 information he relied upon to go talk to Mr. McKenzie, and also  
17 that it's clear that they would not approach Mr. McKenzie  
18 otherwise. The train goes through Albuquerque every day, and I  
19 think the DEA is pretty much there every day, and so they  
20 didn't just go there looking for whoever looks suspicious; they  
21 actually targeted Mr. McKenzie, and again, when they came  
22 close -- when he indicated that that is who he felt  
23 Mr. McKenzie was when he saw him on the platform, that that's  
24 why he turned on his belt.

25                  And as far as coming from a source or destination

1 city, that's very vague. I don't remember the cite of the  
2 Supreme Court that talks about that and it's analyzing the  
3 drug-courier profile, but that's probably the weakest factor  
4 that the DEA should rely upon in determining whether or not a  
5 person meets the drug-courier profile. They need more than  
6 that.

7 And I think it's clear from the testimony of the  
8 agent this morning that they did not have enough information --  
9 at least that would be the argument I would make at this  
10 point -- to even conclude that he met the drug-courier profile  
11 based on the fact that he had not purchased this ticket with  
12 cash and he did not purchase it immediately before travel.

13 But all things said, Your Honor, I think the question  
14 comes down to whether or not it was a consensual encounter or  
15 investigative stop, and I think it's, again, clear from our  
16 perspective and the testimony that came out, that it was  
17 definitely an investigative stop, and if not consensual, other  
18 than maybe the initial conversation, but other than that, Your  
19 Honor, it was not consensual.

20 The agent, based upon his authority as the agent from  
21 the DEA, asked to see Mr. McKenzie's ticket. He did not advise  
22 Mr. McKenzie he had a right to refuse, he did not advise  
23 Mr. McKenzie he had a right to not answer any of his questions.  
24 He made it very clear that he was from the Drug Enforcement  
25 Administration and that Mr. McKenzie had to comply with his

1 request, and those requests included showing the ticket, which  
2 meant he had to go back to his compartment to grab it, and that  
3 none of that was consensual in any sense of the word, Your  
4 Honor.

5 THE COURT: What -- How do you respond to  
6 Mr. Martinez's point that -- that Mr. McKenzie knew that he  
7 could refuse and -- refuse consent because that's sort of the  
8 third time, whether to use the dog-sniffing -- the  
9 drug-sniffing dog on the boxes? Mr. McKenzie did refuse there  
10 and indicated that he knew his rights.

11 MR. PADILLA: Well, again, Your Honor, the agent got  
12 into the compartment by his authority as a Drug Enforcement  
13 Administration, and I don't think he ever gave Mr. McKenzie a  
14 choice or ever advised him that he had a right to refuse to  
15 allow him into the compartment.

16 I think he felt compelled to cooperate with the DEA,  
17 and that I guess at some point it went too far, and I think the  
18 reason for him not consenting -- and I think even the agent  
19 testified to this -- was that Mr. McKenzie made it clear that  
20 he was afraid of dogs, he did not want a dog near his person,  
21 and that was the reason why he refused, and not because he  
22 had -- because he knew he had a right to refuse that encounter.  
23 I think that was clear from the record, that he had indicated  
24 he was afraid of dogs and that was the reason he wasn't  
25 agreeing to that procedure.

1                   THE COURT: All right. Anything further,  
2 Mr. Padilla?

3                   MR. PADILLA: No, sir.

4                   THE COURT: All right.

5                   MR. PADILLA: Again, I just wanted to clarify with  
6 regard to my client's request from a Franks hearing, it's  
7 coming from my client. I told him about that, but it may  
8 present some conflict between me and my client, how we proceed  
9 with that.

10                  I think Mr. McKenzie wanted to address the Court  
11 because he doesn't have legal papers with him, but I have to be  
12 honest as a member of the court, I'm not sure if a Franks  
13 hearing is warranted in this case, but I'll talk to my client  
14 some more about that, Your Honor, but it could present some  
15 conflict down the road between myself and Mr. McKenzie if he  
16 insists that we should request a Franks hearing.

17                  THE COURT: All right. Well, I'll not conduct a  
18 Franks hearing today, but if at some point the defendant wants  
19 to move for such, then we'll deal with the request at that  
20 point.

21                  Let me first -- Mr. McKenzie.

22                  THE DEFENDANT: May I address the Court?

23                  THE COURT: You may.

24                  Mr. McKenzie, let me caution you -- and I'm sure  
25 Mr. Padilla -- about talking here in open court in front of the

1 Court on the record and in front of the United States without  
2 your counsel. I'm concerned about that. I mean, I'm not going  
3 to preclude you from talking, but I'm not sure that it's wise  
4 for you to do so without spending some time with Mr. Padilla,  
5 and then maybe requesting at another time to do it.

6 THE DEFENDANT: As I say, my paperwork is not here,  
7 and the thing is that I'm in CCA and the law library is  
8 inadequate, but somehow I've been able to research my case,  
9 and, based on the opinion that you handed down, there was an  
10 informant. I won't speak about anything incriminating, but  
11 going to the specific things about the informant.

12 I told Mr. Padilla that when I first got arrested,  
13 July 7th I had a preliminary hearing the next day, and at that  
14 preliminary hearing Officer Hyland came in and he was  
15 questioned by Mr. Padilla. After that I got the felony -- I  
16 got the complaint, which is the DEA 6 forms, and after that got  
17 the warrant, which is issued by the judge.

18 Nowhere on there -- And the attorney before  
19 Mr. Martinez was Mr. Gonzales. He put in a motion that we  
20 replied; he put another motion and we replied to that motion.  
21 Nowhere on there was there ever mentioned about confidential  
22 source whatsoever. Not until August 20th, when we had the  
23 hearing and Mr. Padilla questioned the -- questioned  
24 Mr. Hyland, that he first said "ticket agent."

25 Then the prosecutor directly objected and got up and

1 said -- he quoted Roviaro, but then couldn't explain the two  
2 prongs. And I'm just trying to explain to Your Honor, I know  
3 why he couldn't explain the two prongs. Because based on his  
4 own testimony, he got the facts from a tipster, who isn't  
5 supposed to be quoted during or after.

6 So my thing is, how could he qualify as an informant,  
7 let alone as an agent skilled by an opinion on the report?  
8 Wouldn't that be generic? How would that qualify him as an  
9 informant?

10 So my research, the only remedy for that would be a  
11 Franks hearing. I feel that to establish that, how could you  
12 bring an informant to testify in the middle of a hearing when  
13 he was never mentioned in the onset, during the middle -- I  
14 mean -- pardon me -- during the beginning, then it came in only  
15 upon a hearing on redirect by the prosecutor? Because on  
16 direct when asked him, "Who did you get it from?" he said,  
17 "Ticket agent." Then he objected and said, "Well, don't you  
18 mean informant?" like he basically coached him to say  
19 "informant." As an officer, he would have known that it from  
20 came a tipster, an informant. To prove that it's generic, he  
21 didn't know the person before or after.

22 So who is this person tipping Agent Hyland? What  
23 criminal information is he tipping to? Then he said he never  
24 spoke to him before, during or after, so how would he know he  
25 was reliable? There's two prongs, credibility and reliability.

1 How can he prove that if he never spoke to the person before,  
2 during or after? This is his testimony. That's why I feel a  
3 Franks hearing would be a remedy to that, to prove that this  
4 person is not an informant.

5 THE COURT: All right. And have you been able to  
6 talk to Mr. Padilla before today about this?

7 THE DEFENDANT: The problem is that not only did I  
8 speak to Alonzo Padilla, I spoke to his supervisor, and I  
9 advised him that any paperwork that Alonzo was going to file I  
10 would like to see before he presents it.

11 So when Mr. Martinez submitted -- well, he said that  
12 this person was an informant, and then Alonzo argued that --  
13 the fellow officer rule. As soon as I seen it, I seen it was a  
14 mistake. Why would you offer a fellow officer? I know you was  
15 going to come back with an informant if this guy's under the  
16 privilege that that usually protects him as the informant. A  
17 federal officer in reliance of another officer, like John  
18 Claiborne or Joe Perry, if they gave him information, then  
19 this -- he would classify him as fellow officer.

20 He said an informant. He said this person is an  
21 informant, a confidential source, a confidential informant.

22 So I figure he should attack that, not saying he's a  
23 fellow officer, saying he doesn't even qualify to be an  
24 informant because the information he gave is generic. What is  
25 he informing Agent Hylander (sic) to?

1           He said he went to the fax, got a fax. All right.  
2 No cover sheet. How do you even know the fax's supposed to be  
3 for you? If Hylander (sic) -- If Perry -- If Joe Perry and  
4 John Claiborne are the ones that trained these guys to look for  
5 certain things, why wouldn't the fax have came to them?  
6 Wouldn't it have been their informant or their tipster? Why is  
7 Hylander (sic) handling the paperwork? If anything, he should  
8 have investigated to see the authenticity of the paperwork.  
9 Meaning that this is information based on a person's credit  
10 card purchases, which is another issue I have, dealing with the  
11 financial privacy act.

12           This ticket was paid for by credit card. Does Amtrak  
13 allow them to disseminate information to anybody, even the Drug  
14 Enforcement Administration, without properly checking where  
15 this information came from?

16           And for some reason he said that's not an issue. I  
17 feel it is an issue, that before he took the PNR report, came  
18 out to the station to approach me or investigate, he should  
19 have first questioned where the PNR report came from, that was  
20 it even legal for him to have it? Who is this person that sent  
21 it, and how did they get the information?

22           And the fact that -- Another issue I have is the fax.  
23 If you look at the PNR report -- I have paperwork. I've  
24 compared it with other people who's in the prison with me now,  
25 paperwork that's been faxed to the DEA. On the fax, it has to

1 the DEA interdiction group. This tells you when the fax came,  
2 what time -- what time it came. On that PNR report, it has  
3 nothing. Like it just came out straight from a computer.  
4 Like, where does PNR report come from? He said the fax. First  
5 of all, there's no cover sheet, no PNR on the cover sheet. If  
6 you look at the lettering, it's all capitalized lettering, like  
7 it came from the computer itself. It doesn't look like it was  
8 faxed from anyone. It doesn't look like it came from a fax  
9 machine.

10 That's another issue I have. I spoke to the  
11 investigator and I said the only -- all you have to do --  
12 Flagstaff is about one-tenth the size of this room. There's  
13 only one person I dealt, an older person. It has to be him.  
14 It can't be nobody else. Alonzo is saying it was somebody in  
15 Albuquerque, the one that goes through the records and look and  
16 decide whether -- the drug-courier profile. And if that's  
17 true, that person doesn't fit the tipster. No way he could be  
18 the tipster. Like he said, I came here, I was on the train, I  
19 only got off to smoke a cigarette, and I got back on the train.  
20 Nobody in Albuquerque saw me whatsoever. How could that person  
21 qualify as a tipster? The person at the Amtrak station, I gave  
22 my ID. The only thing I probably said to him is, "How are you  
23 doing?" He said, "I'm fine." That's it. How could he qualify  
24 as a tipster? What is he tipping to?

25 And that's the questions I have for my lawyer that I

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 wanted to put on my record, but he said that's moot, that's not  
2 an issue. And I feel it is an issue, and I have case law  
3 backing it up.

4 I had a case -- oh, I can't remember offhand, but it  
5 deals with a female who works for a person, a proper company.  
6 What she does, she's a bookkeeper. And what she did was that  
7 she took the records and went to the FBI. The FBI said he  
8 couldn't accept it because he needed a subpoena.

9 I spoke to Mr. Alonzo. They have a record of my  
10 T-Mobile. Based on the arrests, the fact they found the drugs,  
11 they went and they got a warrant, then they subpoenaed my  
12 T-Mobile bill. They came back through the fax. You could see  
13 it was addressed to the DEA, per DEA interdiction group.

14 So wouldn't the same hold true for getting my credit  
15 card information? Excluding -- Not even arguing that, Amtrak  
16 is a federal entity, is a private company. Wouldn't the same  
17 rules apply to get my PNR report if it was -- if it was  
18 purchased by a credit card? I could understand if I paid cash.  
19 That's a person who's a tipster who would have firsthand  
20 knowledge of the way I carried myself and the fact that I paid  
21 with hundred-dollar bills, twenty-dollar bills, what I was  
22 wearing.

23 That's another thing. When he came to the Amtrak  
24 station, he didn't know if I was on the train. So how is this  
25 guy definitely a tipster? He would have tipped him with more

1 information. Mr. McKenzie will definitely be on the train.  
2 This is what he's wearing. This is the color of his suitcase.  
3 He probably saw the tag on the suitcase and relayed the  
4 information --

5 MR. PADILLA: I don't want him to go into too much of  
6 that.

7 THE COURT: Let's do this. I see -- I see some of  
8 your points, and I'm not going to preclude you from raising  
9 those points, but let me do this. Let me first work on the  
10 suppression motion, and then after you see what I do on that,  
11 then you and Mr. Padilla can look at -- look at the opinion and  
12 decide whether these issues are still ones that you want to  
13 pursue, and, if so, then I'm not precluding you from doing it,  
14 but I think at the present time what I ought to do is take all  
15 the evidence on a motion to suppress, give you a ruling, and  
16 then y'all can meet and discuss where to go from there. Okay?

17 THE DEFENDANT: Thank you. Thank you, Your Honor.

18 MR. PADILLA: Thank you, Judge.

19 THE COURT: All right. Counsel, I appreciate your  
20 assistance this afternoon, and I'll try to get this opinion and  
21 order to you as soon as possible so that y'all can see maybe  
22 where to go from there.

23 All right. Y'all have a good afternoon.

24 (Court stood in recess at 2:46 p.m.)

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Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

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## I N D E X

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## EXAMINATION

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WITNESS: MARK HYLAND

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Direct Examination By Mr. Padilla

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Cross-Examination By Mr. Martinez

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Redirect Examination By Mr. Padilla

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Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 C-E-R-T-I-F-I-C-A-T E

2 UNITED STATES OF AMERICA

3 DISTRICT OF NEW MEXICO

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5 I, Danna Schutte Everett, RPR, CCR, CRR, Official  
6 Court Reporter for the State of New Mexico, do hereby  
7 certify that the foregoing pages constitute a true  
8 transcript of proceedings had before the said Court held  
9 in the City of Albuquerque, New Mexico, in the matter  
10 therein stated.

11 In testimony whereof, I have hereunto set my hand on  
12 this 4th day of August, 2010.

13

14

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DANNA SCHUTTE EVERETT  
Registered Professional Reporter  
Registered Merit Reporter  
Certified Realtime Reporter  
NM Certified Court Reporter #139  
333 Lomas Boulevard, Northwest  
Albuquerque, New Mexico 87102  
Phone: (505) 348-2283  
Fax: (505) 348-2285

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24 February 18, 2010, USA vs. McKenzie

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Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283